

JAN 26 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ABEL CERVANTES-VALERO,

Defendant - Appellant.

No. 08-30132

D.C. No. 1:07-cr-30020-PA

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Submitted January 13, 2009^{**}

Before: O'SCANNLAIN, BYBEE, and CALLAHAN, Circuit Judges.

Abel Cervantes-Valero appeals from the 30-month sentence imposed following his guilty-plea conviction for illegal re-entry, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Cervantes-Valero contends that the district court procedurally erred by: (1) failing to adequately explain the sentence; and (2) failing to consider the sentencing factors under 18 U.S.C. § 3353(a). We conclude that the district court did not procedurally err. *See United States v. Perez-Perez*, 512 F.3d 514, 516 (9th Cir. 2008); *see also United States v. Carty*, 520 F.3d 984, 992, 995-96 (9th Cir. 2008) (en banc).

Cervantes-Valero also contends that the sentence is substantively unreasonable in light of various factors under § 3553(a). We conclude that the sentence is substantively reasonable in light of the totality of the circumstances. *See Carty*, 520 F.3d at 993.

Finally, Cervantes-Valero contends that, under the doctrine of constitutional avoidance, the statutory maximum for his offense is two years because the fact of his prior conviction was neither submitted to a jury nor admitted in a guilty plea, and the necessary level of proof required by the Sixth Amendment is an open question. This contention is foreclosed. *See United States v. Zepeda-Martinez*, 470 F.3d 909, 912 (9th Cir. 2006); *see also United States v. Grisel*, 488 F.3d 844, 846-47 (9th Cir. 2007) (en banc).

AFFIRMED.